

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1105

To be argued by
HUGH W. CUTHBERTSON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1105

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID DANIEL EVANS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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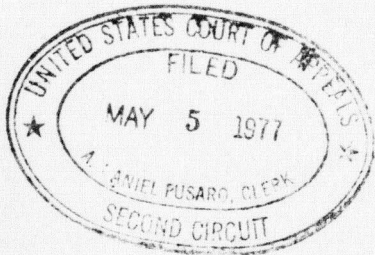


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**United States Court of Appeals
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Docket No. 77-1105

UNITED STATES OF AMERICA,

Appellee.

—v.—

DAVID DANIEL EVANS,

Appellant.

BRIEF FOR THE APPELLEE

Issues Presented

- I. Whether the trial court erred by adjudicating the appellant to be in criminal, rather than civil, contempt for his refusal to comply with its order directing him to provide the Government with a complete set of his fingerprints and by imposing a sentence of six months therefor, where the appellant was incarcerated, while awaiting trial, in lieu of bond?
- II. Whether the trial court exceeded its authority by issuing a post-indictment, pre-trial order directing the appellant to provide the Government with a complete set of his fingerprints?

Statement of the Case

This is an appeal from a judgment of conviction of criminal contempt in the United States District Court for the District of Connecticut (Newman, J.), on February 14, 1977, after the court's adjudication of criminal contempt on December 3, 1976.

On November 16, 1976, a Grand Jury sitting in Hartford, Connecticut, returned a six count indictment (Criminal No. N-76-145) charging the appellant, David Daniel Evans, with the robbery of three banks in New Haven, Connecticut between October 14, 1976 and November 8, 1976, in violation of Title 18, United States Code, Sections 2113(a) and 2113(b). On November 23, 1976, counsel was appointed, Evans entered a plea of not guilty and the court set a bond in the amount of \$20,000 with full surety. A trial date of January 3, 1977, was thereupon scheduled.

On November 29, 1976, the court, upon the Government's formal motion and following an oral hearing, ordered Evans to provide special agents of the Federal Bureau of Investigation (F.B.I.) with a complete set of major case fingerprints and exemplars of his handwriting. On November 30, 1976, Evans refused to provide the agents with any of his fingerprints, and, following a hearing on December 3, 1976, the court found Evans in criminal contempt of its order of November 29, 1976. Imposition of sentence was deferred until the conclusion of the underlying bank robbery charges.

On January 3, 1977 a jury was empanelled and on January 11, 1977, Evans entered a change of plea to counts four and six of the indictment. On February 14, 1977, Evans received a sentence of two years on count four, a consecutive sentence of six months on the criminal contempt and a suspended sentence of ten years with five years probation on count six, the probation to commence after service of the sentences imposed on count four and the criminal contempt. The court recommended that Evans be committed to the Federal Correctional Institution, Lexington, Kentucky. Evans is currently serving this sentence.

Notice of Appeal to this court from the judgment and conviction of criminal contempt was filed on February 17, 1977.

Statement of Facts

On October 14, 1976, the First Bank, 696 Howard Avenue, New Haven, Connecticut, was robbed by a lone black male, who presented a demand note to a teller. On November 4, 1976, a black male, who also presented a demand note, robbed the Connecticut Savings Bank, 896 Howard Avenue, New Haven, Connecticut. On November 8, 1976, the Hartford National Bank and Trust Company, 120 Park Street, New Haven, Connecticut, was robbed by a single black male who, again, used a demand note.

The three notes were similar in wording and appearance and a fingerprint analysis thereof by the New Haven police resulted in the positive identification of Evans' fingerprint on one of the notes. (App. 24, 39, 55-56; Tr. 33-34).^{*} Although fragmentary latent fingerprints were found on the other two notes, no comparison between these prints and Evans' known fingerprints could be made because neither the New Haven police nor the F.B.I. had on file inked impressions of Evans' palms, the sides of his hands or the sides of his fingers. (App. 52-53, 56; Tr. 31, 33, 35-36).

On November 23, 1976, therefore, following Evans' arraignment in federal court,¹ the Government made an

^{*} References marked "App." and "Tr." refer, respectively, to the appendix of Evans' brief on appeal and to the trial transcript.

¹ Evans was then in state custody, being held on a substantially higher bond than that set by Judge Newman. (Tr. 3; App. 2).

oral motion that he be required to furnish the Government with a complete set of major case fingerprints² and exemplars of his handwriting. The court granted the Government's motion over Evans' objection. (App. 21-26). Evans subsequently refused to comply with the court's order and, after an oral hearing, the matter was continued until November 29, 1976, in order to allow defense counsel time to file a written memorandum in opposition to the Government's motion. (App. 26-42).

On November 29, 1976, the Government filed a formal motion to compel Evans to provide the desired fingerprints and handwriting, and, after an oral hearing on the matter, the court again ordered Evans to comply with the Government's request. (App. 43-49). On November 30, 1976, the Government unsuccessfully sought an order from the court to obtain handwriting exemplars from Evans which were not specified in its motion filed the previous day. (Tr. 17-21). Evans subsequently provided the Government with exemplars of his handwriting as set forth in the court's order of November 29, 1976, but refused to provide any fingerprints.

On November 30, 1976, the Government filed a motion for order to show cause why Evans should not be held in criminal contempt. (App. 15-16). On December 3, 1976, the court held a non-jury hearing on the Government's motion and, after receiving the testimony of special agent John M. Quinn of the F.B.I. and hearing argument of counsel, found Evans in criminal contempt

² At the contempt hearing a special agent of the F.B.I. explained that "major case fingerprints" include impressions of the palms as well as the sides of the hand and fingers. (App. 53-54). The standard fingerprints which law enforcement authorities routinely take include only the flat portion of the bottom of the fingers. These were the type of fingerprints which the U.S. Marshal had taken from Evans on the day of his arraignment and which the New Haven police had on file. (App. 53; Tr. 35-36).

of its order. (Tr. 23-42; App. 50-62). Imposition of sentence was deferred until the conclusion of the underlying bank robbery charges. (App. 62).

ARGUMENT

I.

The trial court properly adjudicated Evans to be in criminal, rather than civil, contempt for his refusal to comply with its order directing him to provide the Government with a complete set of his fingerprints and properly imposed a sentence of six months therefor, where he was incarcerated, while awaiting trial, in lieu of bond.

In *Shillitani v. United States*, 384 U.S. 364, 371 (1966), the Supreme Court stated that a court, when presented with a contemnor's continued defiance of its order, "must exercise the least possible power adequate to the end proposed." Thus, the Court explained (384 U.S. at 371 n.9):

This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.

Judge Newman determined that because Evans was already in custody, it was unrealistic to expect that the prospect of continued custody, which would result upon a finding of civil contempt and which would expire upon the commencement of trial,³ would have any coercive

³ Trial had been set at arraignment for January 3, 1977, or only a month from the day of the contempt hearing.

effect in bringing about compliance with the court's order. Evans contends (Appellant's Brief, at 6-7) that this determination was in error because the court overlooked the fact that the period between a finding of civil contempt and trial would not count toward the service of a sentence upon conviction of the underlying bank robbery charges and, hence, the prospect of serving such time would be sufficiently coercive for the purposes of civil contempt. This contention, however, is without merit, for as the Supreme Court explained in *United States v. Wilson*, 421 U.S. 309, 317 n.9 (1975), the threat of immediate confinement provides little incentive for an already-incarcerated contemnor to comply with a court's order.⁴ Judge Newman's decision that civil contempt would under these circumstances be inappropriate was clearly correct.

Evans' assertion (Appellant's Brief, at 7) that the adjudication of criminal contempt removed whatever incentive for compliance that may have existed during the month prior to trial assumes as true that which the Supreme Court in *Wilson* specifically rejected—namely, that where, as here, the contemnor is already in custody, the threat of continued confinement for civil contempt does not provide any real coercion. This assertion, moreover, is inaccurate, for although the court made it clear that it had made an unconditional finding of criminal contempt which would not be set aside in the event of compliance, it deferred imposition of sentence until resolution of the underlying criminal case and observed that,

⁴ There, the Court, with full knowledge that a civil contempt sentence would result in additional or so-called "dead" time and with specific reference to its decision in *Shillitani*, upheld the finding of criminal contempt and imposition of sentence upon two contemnors who were incarcerated at the time they were adjudicated in contempt.

as with any criminal charge, a defendant who elects to take steps in mitigation of the offense is entitled to have those steps considered in his favor at the time of sentencing. (App. 62). Plainly, although Evans could not purge himself of the finding of criminal contempt, the court left him with sufficient incentive to comply with its order.

Evans' argument (Appellant's Brief, at 7-9) that the court's finding of criminal contempt violated his right to the equal protection of the laws is without merit. Although Evans' inability to meet bond, which was a result of his economic status, did bear upon the court's decision to impose criminal, rather than civil, contempt,⁵ the court, as a practical matter, could only view Evans' confinement as it then existed in determining which sanction was appropriate. The reason for confinement is simply irrelevant to the question of whether civil contempt would provide an effective incentive for compliance with the court's order. In view of the Supreme Court's recognition in *United States v. Wilson*, *supra*, that civil contempt under these circumstances would not be appropriate, Judge Newman's finding was proper.⁶

The opinions in *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970) and *United States v. Gaines*, 449 F.2d 143 (2d Cir. 1971), upon which

⁵ Another factor which had bearing upon the decision was the relatively short amount of time between the contempt hearing and the scheduled commencement of trial. (App. 61). Indeed, defense counsel recognized in argument that the sixty days allowed by local rule between arraignment and trial may be asserted by the Government as additional reason for imposing criminal contempt. (App. 58).

⁶ To hold otherwise would mean that the sanctions of criminal contempt could never be applied to one who is unable to meet bond, regardless of his financial circumstances.

Evans relies, do not require a contrary result, for none of these cases involved a charge of contempt. In *Tate* and *Williams*, indigent criminal defendants were imprisoned because they were unable to pay certain fines which had been imposed. In each instance, the Court reversed, noting that the traditional ground for justifying default imprisonment was that it was a coercive device to ensure obedience to a court's imposition of fine. With respect to an *involuntary* nonpayment of fine, however, the Court explained that such confinement was not coercive but rested upon an inability to pay, thus creating an impermissible discrimination and serving no penal objective of the State. *Tate v. Short*, *supra*, 401 U.S. at 399; *Williams v. Illinois*, *supra*, 399 U.S. at 240-241. Here, however, Evans' pretrial custody served a definite objective by assuring his presence at trial. The sentence imposed⁷ as a result of his contempt likewise was a legitimate exercise of the court's power. In the area of contempt, moreover, unlike default imprisonment, the prospect that confinement would not be coercive required the action taken here. In addition, unlike the defendants in *Tate* and *Williams*, Evans *could* have complied with the court's order and it was only after noncompliance that his confinement had any bearing upon the consequences. Any discrimination resulted from Evans' inability to post bond,⁷ a factor which, as Judge Newman explained (App. 60), would in all likelihood exist with respect to a wealthier defendant charged with the same crime.

This court's decision in *United States v. Gaines*, *supra*, relied upon the Supreme Court's opinions in *Tate* and *Williams* for its finding that a defendant, whose indigency precluded him from meeting state bail and hence from

⁷ Defense counsel did not challenge during the contempt hearing the reasonableness of Evans' bond. (App. 58).

commencing service of his federal sentence, must be credited on his federal sentence with the time spent in state custody *where the state charges were subsequently dismissed*. The essential unfairness, present in *Gaines*, that an indigent defendant, who has been confined because of his indigency, should not have such period of time credited toward the service of his sentence of imprisonment, *see Paroutian v. United States*, 471 F.2d 289 (2d Cir. 1972), has no application to the facts of this case. Evans plainly has been denied no credit toward the service of his sentence on the bank robbery charges for his pretrial confinement.

Evans' argument that the finding of criminal contempt denied him the equal protection of the laws blurs the fact that he was not punished for his indigency but for his open and continued defiance of the court's order. It is not at all clear, moreover, that the civil remedy would have been appropriate, even had Evans not been confined, for incarceration during the relatively short period of time between arraignment and trial would, we submit, have provided little incentive for compliance. *See* note 5, *supra*. Indeed, viewed from hindsight, the lack of coercion which civil contempt would have offered is apparent, for even though Judge Newman made it clear, once he found Evans in criminal contempt, that any steps taken in mitigation of the offense would be considered at the time of sentencing, Evans persisted in his refusal to obey the court's order.

Evans also attacks (Appellant's Brief, at 9-10) the imposition of a six month sentence to the extent that it exceeds the time he would have served had he been cited for civil contempt. This claim, however, relies upon the same arguments initially presented to attack the adjudication of criminal contempt and ought to be rejected for the reasons offered above. Evans' claim (Appellant's

Brief, at 10) that the six month sentence was not an "exercise of the least power adequate to the end proposed" misapplies the rule in *Shillitani v. United States, supra*, 384 U.S. at 371, for there the Court was concerned with the initial question of whether and when a court should resort to criminal, rather than civil, contempt; no question was raised concerning the sentence to be imposed once it was determined that the criminal sanction was appropriate.

II.

The trial court was well within its authority in issuing a post-indictment, pretrial order directing Evans to provide the Government with a complete set of his fingerprints.

Evans contends (Appellant's Brief, at 11-14) that the trial court lacked any authority to issue a post-indictment, pretrial order requiring him to provide the Government with a complete set of his fingerprints and specified exemplars of his handwriting. Recognizing that he has no privilege against providing such information and that the Government's request may have been proper at trial, Evans asserts that because Rule 16 of the Federal Rules of Criminal Procedure does not specifically provide for this type of request, the trial court's order constituted error. This claim has no substance.

In *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) and *United States v. Wade*, 388 U.S. 218, 221-23 (1967), the Supreme Court held, respectively, that the taking of a handwriting exemplar after arrest but before arraignment and a defendant's appearance in a post-indictment, pre-trial line-up were not protected by the Fifth Amendment and, as such, were proper. Evans' claim (Appel-

lant's Brief, at 13) that these decisions are not controlling because the events there being reviewed occurred prior to the regulation of pretrial discovery by rule is discredited by the decisions of this and other circuits which have succeeded the opinions in *Wade* and *Gilbert* and which were decided during a regulated pretrial discovery. See *United States v. Rothman*, 463 F.2d 488, 490 (2d Cir.), cert. denied, 409 U.S. 956 (1972); *United States v. Izzi*, 427 F.2d 293, 295 (2d Cir.), cert. denied, 399 U.S. 928 (1970); *United States v. Franks*, 511 F.2d 25, 32 (6th Cir.), cert. denied, 422 U.S. 1042 (1975); *United States v. Tucker*, 473 F.2d 1290, 1294 (6th Cir. 1973); *United States v. Lincoln*, 494 F.2d 833, 838-39 (9th Cir. 1974); *United States v. Rogers*, 475 F.2d 821, 825-26 (7th Cir. 1973); *United States v. Nix*, 465 F.2d 90, 92-94 (5th Cir.), cert. denied, 409 U.S. 1013 (1973); *In re Reardon*, 445 F.2d 798, 799 (1st Cir. 1971).

The foregoing decisions, which uphold the taking of fingerprints and handwriting exemplars between indictment and trial, clearly support the Government's request for Evans' fingerprints and handwriting in this case.⁸ Evans' premise (Appellant's Brief, at 12) that a defendant's mere lack of privilege against disclosing certain information does not establish the Government's entitlement thereto is unsupported by any authority and is contrary to existing case analysis. Thus, the Supreme Court has explained that the dual aim of the criminal justice system is "that guilt shall not escape or innocence

⁸ Evans' argument that Rule 16 sets forth in any exclusive fashion that information which the Government may obtain from a defendant between indictment and trial was expressly rejected by the First Circuit in *In re Reardon*, *supra*, 445 F.2d at 799. See also *United States v. Cammisano*, 413 F. Supp. 886, 892-93 (W.D. Mo. 1976). Thus, Evans' suggestion (Appellant's Brief, at 13) that this argument has never before been considered is incorrect.

suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). As the Court recently observed in *United States v. Nixon*, 418 U.S. 683, 709 (1974):

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Decisions of the Court, moreover, have repeatedly recognized the ancient proposition of law that "the public has the right to every man's evidence" unless protected by privilege. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Nixon*, *supra*. Indeed, it is because privileges against forced disclosure are exceptions to the demand for every man's evidence, that they are "not lightly created nor expansively construed." *United States v. Nixon*, *supra*, 418 U.S. at 710. Thus, where the disclosure of evidence "might substantially enhance the search for truth,"⁹ the only inquiry is whether com-

⁹ Here, Judge Newman noted (App. 23) that the grand jury indictment was a sufficient basis to single Evans out from the population at large. He was informed, moreover, that in each of the three bank robberies, a demand note, on which partial or fingerprints were discovered, was left by the robber. (App. 24, 39).

elling its disclosure is precluded by some privilege. *United States v. Nobles*, 422 U.S. 225, 232 (1975).

Evans would have this court preclude the Government from obtaining information between indictment and trial, which is subject to no privilege and which it could admittedly obtain either prior to indictment or during trial. The only result would be a delay in the Government's receipt of evidence and a delay at trial. Judge Newman's order, requiring Evans to provide the Government with fingerprints and handwriting following arraignment rather than awaiting trial, was proper both as a matter of policy and law.

CONCLUSION

For all of the foregoing reasons, the judgment of conviction of criminal contempt and imposition of sentence should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-1105

U S A,
APPELLEE

v.

DAVID DANIEL EVANS,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, New York 10023

That on the 4th day of May, 1977, deponent served the within Brief
upon Andrew B. Bowman, Esq., Federal Public Defender, 770 Chapel Street, New Haven,
Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 4th day of May 1977

Edward A. Quimby
EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979